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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gary Cawley, et al.,) No. CV-22-00823-PHX-SPL
Plaintiffs,)
vs.)
American Financial Security Life)
Insurance Company, et al.,)
Defendants.)
ORDER

Before the Court are Plaintiffs' and Defendant's pending motions in limine and responses, which are listed by title and document number below.

Plaintiffs' Pending Motions in Limine (7):

- MIL No. 1: To exclude evidence, testimony, or inquiries regarding the portion of Armpriester's Letter referring to Covid and AZDIFI's response. (Doc. 171). Defendant's Response (Doc. 203).
- MIL No. 2: To exclude evidence, testimony, or inquiries regarding the 30-day waiting provision. (Doc. 172). Defendant's Response (Doc. 204).
- MIL No. 4: To exclude evidence, testimony, or inquiries regarding AZDIFI's receipt and approval of AFSLIC's Policy. (Doc. 178). Defendant's Response (Doc. 206).
- MIL No. 5: To preclude Christopher Martin from testifying about the conspicuousness of language and/or disclaimers in the subject insurance documents. (Doc. 202). Defendant's Response (Doc. 207).
- MIL No. 6: To preclude Christopher Martin from testifying about the legal status of the relationship between the

1 individuals who sold the subject short term health insurance
 2 plan and the purchaser of the plan. (Doc. 180). Defendant's
 3 Response (Doc. 208).

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- 5 ○ MIL No. 7: To preclude Christopher Martin from testifying
 6 about whether Plaintiffs' expectations of coverage were
 7 reasonable. (Doc. 181). Defendant's Response (Doc. 209).
- 8 ○ MIL No. 8: To preclude Christopher Martin from testifying as
 9 to what a reasonable consumer would or would not do. (Doc.
 10 184). Defendant's Response (Doc. 210).

11 **Defendant's Pending Motions in Limine (15):**

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- 13 ○ MIL No. 1: To exclude testimony, argument, or evidence
 14 related to Plaintiffs' sale of their franchised business. (Doc.
 15 166). Plaintiffs' Response (Doc. 212).
- 16 ○ MIL No. 2: To exclude testimony, argument, or evidence
 17 related to the sale of Plaintiffs' house. (Doc. 167). Plaintiffs'
 18 Response (Doc. 213).
- 19 ○ MIL No. 3: To exclude testimony, argument, or evidence
 20 related to Plaintiffs' claim that Plaintiff Gary Cawley's credit
 21 was damaged. (Doc. 168). Plaintiffs' Response (Doc. 214).
- 22 ○ MIL No. 5: To preclude introduction of certain brochures as
 23 evidence at trial. (Doc. 170). Plaintiffs' Response (Doc. 216).
- 24 ○ MIL No. 6: To exclude testimony, argument, or evidence
 25 related to the "Traditional Plan." (Doc. 173). Plaintiffs'
 26 Response (Doc. 217).
- 27 ○ MIL No. 7: To exclude testimony, argument, or evidence
 28 related to other consumer complaints as to IBA or AFSLIC.
 29 (Doc. 174). Plaintiffs' Response (Doc. 219).
- 30 ○ MIL No. 8: To exclude testimony, argument, or evidence
 31 related to Plaintiffs' argument that they did not receive the
 32 benefits of the policy as written. (Doc. 175). Plaintiffs'
 33 Response (Doc. 220).
- 34 ○ MIL No. 9: To preclude introduction of Plaintiffs' bank and
 35 credit card statements as evidence at trial. (Doc. 176).
 36 Plaintiffs' Response (Doc. 221).
- 37 ○ MIL No. 10: To preclude introduction of AFS STM SCRIPT
 38 416 (produced by Plaintiffs as CAWLEY000974-980) as
 39 evidence at trial. (Doc. 182). Plaintiffs' Response (Doc. 222).
- 40 ○ MIL No. 11: To preclude introduction of Plaintiffs' "DES
 41 Application" as evidence at trial. (Doc. 183). Plaintiffs'
 42 Response (Doc. 223).

- 1 ○ MIL No. 12: To preclude introduction of evidence and
2 argument relating to certain administrative orders. (Doc. 190).
3 Plaintiffs' Response (Doc. 224).
- 4 ○ MIL No. 13: To preclude introduction of evidence and
5 argument related to other proceedings against AFSLIC. (Doc.
6 191). Plaintiffs' Response (Doc. 225).
- 7 ○ MIL No. 14: To preclude introduction of certain deposition
8 testimony of Bradley Burd at trial. (Doc. 193).
- 9 ○ MIL No. 15: To preclude introduction of certain deposition
10 testimony of Michael Fowler at trial. (Doc. 194).
- 11 ○ MIL No. 16: To preclude introduction of certain deposition
12 testimony of Jacob Armpriester at trial. (Doc. 195). Plaintiffs'
13 Response to MILs 14–16 (Doc. 226).¹

10 The Court heard oral argument on these motions during the May 28, 2025 Final Pretrial
11 Conference (ME 228), and it issued bench orders on Plaintiffs' Motions in Limine Nos. 3
12 and 9, as well as Defendant's Motion in Limine No. 4. It took the remaining motions in
13 limine under advisement.

14 Also before the Court are Defendant's fully briefed *Daubert* motions to exclude the
15 testimony of Plaintiffs' experts William Warfel (Docs. 187, 230, 233) and Mark McKinnon
16 (Docs. 188, 231, 234).

17 As to the two *Daubert* motions and the remaining motions in limine, the Court now
18 rules as follows.

19 I. MOTIONS IN LIMINE

20 A. Legal Standards

21 “A motion in limine is a procedural mechanism to limit in advance testimony or
22 evidence in a particular area,” *United States v. Heller*, 551 F.3d 1108, 1111 (9th Cir. 2009),
23 and “the practice has developed pursuant to the district court’s inherent authority to manage
24 the course of trials,” *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984). “[A] ruling on a

25
26 ¹ Because Defendant's Motions in Limine 14–16 are lengthy objections to specific
27 lines in various deposition transcripts, Plaintiffs did not respond specifically to each
28 objection, but they “request that the Court deny Defendant’s Motions in Limine Nos. 14–
16 and allow for the parties to fully be able to object to and respond to objections to
deposition designations at a later date.” (Doc. 226 at 2).

1 motion *in limine* is essentially a preliminary opinion that falls entirely within the discretion
 2 of the district court.” *City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1070 (9th Cir.
 3 2017) (citation omitted). A motion in limine “must identify the evidence at issue and state
 4 with specificity why such evidence is inadmissible.” *Colton Crane Co., LLC v. Terex
 5 Cranes Wilmington, Inc.*, No. CV 08-8525 PSG (PJWx), 2010 U.S. Dist. LEXIS 141013,
 6 at *3 (C.D. Cal. May 19, 2010).

7 Evidence may not be admitted at trial unless it is relevant, as defined by Rule 401
 8 of the Federal Rules of Evidence. Evidence is relevant if it has “any tendency to make the
 9 existence of any fact that is of consequence to the determination of the action more
 10 probable or less probable than it would be without the evidence.” Fed. R. Evid. 401. The
 11 particular facts of the case determine the relevancy of a piece of evidence. *See* 2 Jack B.
 12 Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence § 401.04 [2] [a] (Joseph
 13 M. McLaughlin ed., 2d ed. 2000) (“Relevance is not inherent in any item of evidence but
 14 exists only as a relation between an item of evidence and a matter properly provable in the
 15 case.”).

16 Federal Rule of Evidence 403 provides: “The court may exclude relevant evidence
 17 if its probative value is substantially outweighed by a danger of one or more of the
 18 following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting
 19 time, or needlessly presenting cumulative evidence.” A decision regarding probative value
 20 must be influenced by the availability of other sources of evidence on the point in question.
 21 *See Old Chief v. United States*, 519 U.S. 172, 182–85 (1997). “Where the evidence is of
 22 very slight (if any) probative value, it’s an abuse of discretion to admit it if there’s even a
 23 modest likelihood of unfair prejudice or a small risk of misleading the jury.” *United States
 24 v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992).

25 **B. DISCUSSION**

26 **1. Plaintiffs’ Motion in Limine No. 1 (Doc. 171). Defendant’s Response
 27 (Doc. 203).**

28 Plaintiffs seek an order excluding “evidence, testimony, or inquiries regarding the

1 portion of Armpriester’s October 5, 2021, letter referring to Covid (at AZDOI_000029-31)
 2 and AZDIFI’s response (at CAWLEY000582-586 and AZDOI_000073-74)” as
 3 inadmissible hearsay, irrelevant, and prejudicial. (Doc. 171 at 3).

4 Defendant argues that the letter is not hearsay because it is “not being offered for
 5 the truth of its contents.” (Doc. 203 at 3). Defendant also argues that “AFSLIC’s response
 6 letter, the DOI’s conclusions, and the remainder of the DOI’s file are admissible [under]
 7 803(8)(iii) as a public record” (*Id.*). It is unclear what purpose Defendant intends to
 8 introduce these exhibits for if not to prove that the delay in claims processing was due to
 9 Covid or that Plaintiffs’ claims “were adjudicated in accordance with the written terms of
 10 the policy.” (*Id.* at 4 (emphasis omitted)). They further argue that “[t]he DOI’s
 11 investigation is also relevant to whether AFSLIC acted in bad faith.” (*Id.*).

12 First, this Court agrees with Plaintiffs that the records are irrelevant to their breach
 13 of contract arguments based on the reasonable expectations doctrine. (*See* Doc. 171 at 3).
 14 Furthermore, it agrees that there is a risk that a jury would “substitute AZDIFI’s
 15 determination that the claims were fully paid (under the boiler plate terms) for their own.”
 16 (*Id.*). It is critical that the jury gets to decide whether Defendant breached its contract with
 17 Plaintiffs based on their reasonable expectations regarding coverage and whether
 18 Defendant acted in bad faith. And to the extent that Defendant wishes to argue that Covid
 19 caused delays in claim processing, it may elicit direct testimony on the stand or introduce
 20 business records to that effect rather than relying on Mr. Armpriester’s statement in the
 21 2021 letter.

22 Accordingly, Plaintiffs’ Motion in Limine No. 1 will be granted.

23 **2. Plaintiffs’ Motion in Limine No. 2 (Doc. 172). Defendant’s Response**
 24 **(Doc. 204).**

25 Plaintiffs ask the Court “to preclude evidence that the subject Short Term Medical
 26 insurance policy (“STM Policy”) contains a 30-day waiting period before coverage for
 27 cancer treatment becomes effective.” (Doc. 172 at 1). They argue that evidence of the 30-
 28 day period is irrelevant to Plaintiffs’ bad faith claims because it is a post hoc rationale for

1 American Financial's denial of coverage and because American Financial has already
 2 waived the argument. (*See id.* at 2–3).

3 American Financial counters that the fact that it "has never attempted to enforce the
 4 waiting period by denying the claims in their entirety goes directly to the reasonableness
 5 of AFSLIC's conduct." (Doc. 204 at 3). It states that it "simply seeks to introduce the 30-
 6 day waiting provision as evidence of its good faith and reasonable conduct and not as a
 7 basis to deny coverage." (*Id.*).

8 The Court agrees that evidence regarding the 30-day waiting period is relevant to
 9 Defendant's defense against the bad faith claim, and that Defendant raised the issue in both
 10 its Answer and Motion for Summary Judgment such that the argument has not been waived.
 11 (*See id.* at 2). Accordingly, Plaintiffs' Motion in Limine No. 2 will be denied.

12 **3. Plaintiffs' Motion in Limine No. 4 (Doc. 178). Defendant's Response
 13 (Doc. 206).**

14 Plaintiffs request that "evidence of the subject health insurance forms being
 15 submitted to and/or approved by the Arizona Department of Insurance & Financial
 16 Institutions ("AZDIFI")" be excluded at trial as irrelevant, based on hearsay, and minimally
 17 probative compared to the dangers of confusion or unfair prejudice. (*See Doc. 178 at 1–3*).
 18 Specifically, as to the hearsay issue, they argue that American Financial has not submitted
 19 any documentation regarding the alleged approval of the policy documents; instead, they
 20 offer the testimony of American Financial's compliance director, who "testified that
 21 American Financial's regulatory attorney, Brian Camling, would have submitted the forms
 22 for approval" based on what Mr. Camling told him. (*Id.* at 2).

23 The Court agrees that Mr. Armpriester's proposed testimony regarding what Mr.
 24 Camling may have told him about the policy approval would constitute hearsay. Mr.
 25 Armpriester would be testifying that American Financial's policy documents were indeed
 26 approved by the AZDIFI based only on what someone else told him, not based on his own
 27 direct knowledge of the matter. That is definitional hearsay, and the present sense
 28 impression exception is completely inapposite, contrary to Defendant's argument. (*See*

1 Doc. 206 at 3–4).

2 The information itself—that American Financial’s policy forms were approved by
3 AZDIFI—may be relevant to American Financial’s defense against the breach of contract
4 claim. Thus, Plaintiffs’ motion will be denied to the extent it seeks to exclude *any* evidence
5 or testimony about the alleged approval of forms. However, because Mr. Armpriester lacks
6 personal knowledge regarding those approvals, he will be precluded from testifying as to
7 what he knows based only on what the company’s regulatory attorney told him. He will
8 not be precluded to speaking more generally on his knowledge of the approval process
9 based on his personal knowledge and experience in the industry. The Motion will therefore
10 be granted in part and denied in part.

11 **4. Plaintiffs’ Motion in Limine No. 5 (Doc. 202). Defendant’s Response**
12 **(Doc. 207).**

13 American Financial’s insurance practices expert, Christopher Martin, stated in his
14 Initial Expert Report that he may testify regarding “conspicuous disclaimers on enrollment
15 and plan documents to alert consumers to exclusions or limitations on coverage.” (Doc.
16 202-1 at 5). Plaintiffs argue that any such testimony regarding the conspicuousness of
17 warnings in Plaintiffs’ insurance policy should be excluded, as the obviousness of warning
18 is an issue that a juror “can readily determine” from a lay perspective without need of
19 expert testimony.

20 It is true that under the Federal Rule of Evidence, expert testimony is only necessary
21 if a fact at issue requires “scientific, technical, or other specialized knowledge” to
22 understand. Fed. R. Evid. 701, 702. However, this Court agrees with Defendant’s response
23 that “[t]estimony about customs and practices in the insurance industry with respect to the
24 use of disclaimers, including what is considered a ‘conspicuous disclaimer’ pursuant to
25 industry standards, and about whether AFSLIC’s disclaimers complied with industry
26 standards, is appropriate expert testimony because it is based on the specialized knowledge
27 and expertise described in Mr. Martin’s Initial Report.” (Doc. 207 at 3). The jury remains
28 the finder of fact regarding whether any warnings on the insurance documents were

1 obvious or conspicuous, but Mr. Martin may properly testify as to industry standards for
 2 the kinds of warnings that are considered “conspicuous” in the health insurance industry.

3 Accordingly, Plaintiffs’ motion will be denied.

4 **5. Plaintiffs’ Motion in Limine No. 6 (Doc. 180). Defendant’s Response
 5 (Doc. 208).**

6 Plaintiffs also request that Christopher Martin be precluded “from testifying as to
 7 the legal status of the relationship between the individuals who sold the subject short term
 8 health insurance plan and the purchaser of the plan (Plaintiff Pam Cawley).” (Doc. 180 at
 9 1). Specifically, they argue that “whether there is an agency relationship between American
 10 Financial and Vaval/Bowen is a factual question for the jury that is not a proper subject of
 11 expert testimony.” (*Id.* at 2).

12 American Financial, in response, “agrees that the conclusion as to whether Ms.
 13 Vaval and/or Mr. Bowen were agents of AFSLIC, such that AFSLIC may be bound by or
 14 liable for either individual’s statements, is a legal issue that neither party’s expert should
 15 be allowed to opine on.” (Doc. 208 at 3). However, it argues that if the Court allows
 16 Plaintiffs’ expert, William Warfel, to testify about this legal relationship, Mr. Martin
 17 should be permitted to do so as well.

18 As discussed below with respect to Defendant’s *Daubert* motion (Doc. 187), Mr.
 19 Warfel will be precluded from offering any improper opinions about issues of law. Because
 20 Defendant agrees that neither party’s expert should be allowed to opine on legal
 21 conclusions, Plaintiffs’ motion will be granted.

22 **6. Plaintiffs’ Motion in Limine No. 7 (Doc. 181). Defendant’s Response
 23 (Doc. 209).**

24 Related to Plaintiffs’ Motion in Limine No. 6, Plaintiffs also request that
 25 Defendant’s expert Christopher Martin be precluded from testifying about whether
 26 Plaintiffs’ expectations of coverage under the subject short term health insurance plan were
 27 reasonable. (Doc. 181 at 1). They argue that “[t]he reasonableness about what the Cawleys
 28 believed the plan covered or the reasonableness of their expectations is a matter that does

1 not require expert testimony as it is well within the jury’s own knowledge and experience.”
 2 (*Id.* at 3). Defendant “agrees that the question whether Plaintiffs had a reasonable
 3 expectation of coverage is a factual question for the jury, which will not be aided by the
 4 testimony of either party’s expert.” (Doc. 209 at 4). Defendant further states that “[t]o the
 5 extent the Court grants AFSLIC’s Motion to Exclude the Testimony of William Warfel, in
 6 its entirety or as applied to Mr. Warfel’s improper legal opinions as to the reasonableness
 7 of Plaintiffs’ expectations, AFSLIC will not seek to introduce and therefore does not object
 8 to the exclusion of Mr. Martin’s legal conclusions on the same topic.” (*Id.*). Because this
 9 Court will preclude Mr. Warfel from offering any improper opinions about issues of law,
 10 Plaintiffs’ motion will be granted. Neither party’s experts may offer improper opinions
 11 about the reasonableness of Plaintiffs’ expectations.

12 **7. Plaintiffs’ Motion in Limine No. 8 (Doc. 184). Defendant’s Response
 13 (Doc. 210).**

14 Plaintiffs seek to preclude Defendant’s expert Mr. Martin “from testifying as to the
 15 reasonableness of consumer’s conduct, including the Plaintiffs’ conduct, when purchasing
 16 insurance.” (Doc. 184 at 1). As with the prior two motions, Defendant does not oppose this
 17 motion so long as Plaintiffs’ own expert is not allowed to opine on this subject. (Doc. 210
 18 at 4). Accordingly, the motion will be granted. Neither party’s expert witnesses may opine
 19 on the reasonableness of the Cawleys’ actions when reading/reviewing the STMP, as it is
 20 for the jury to determine whether their conduct was reasonable.

21 **8. Defendant’s Motion in Limine No. 1 (Doc. 166). Plaintiffs’ Response
 22 (Doc. 212).**

23 Defendant seeks to exclude any evidence, testimony, or argument, regarding
 24 Plaintiffs’ franchised business, the sale of their business, and the reasons or consequences
 25 for that sale as it pertains to Plaintiffs’ alleged damages. (Doc. 166 at 1–2). It argues that
 26 Plaintiffs “have not produced any admissible evidence establishing that they sold the B+B
 27 Store as a result of any action by American Financial. Nor have they provided any reliable
 28 business valuation showing any loss from the sale of the B+B.” (*Id.* at 2). Defendant’s

1 disputes with Plaintiffs' alleged damages related to the sale of their franchise business are
2 primarily factual ones, and such factual questions are left to the province of the jury. It is
3 for the jury to decide whether Plaintiffs sold the business due to mounting medical bills,
4 and whether those medical bills were caused by, or not caused by, a breach of contract or
5 bad faith on the part of Defendant. It is also for the jury to decide the extent of any losses
6 caused by the sale of the business. Accordingly, Defendant's motion will be denied.

7 **9. Defendant's Motion in Limine No. 2 (Doc. 167). Plaintiffs' Response
8 (Doc. 213).**

9 In a similar vein as their first motion, Defendant also requests that the Court
10 preclude Plaintiffs from introducing evidence, testimony, or argument "regarding alleged
11 damages incurred because of the sale of their house, including unsupported reasons for and
12 speculative consequences of the sale." (Doc. 167 at 2). For the same reasons as the above
13 motion, this motion will also be denied. It is for the jury to evaluate Plaintiffs' damages
14 arguments at trial.

15 **10. Defendant's Motion in Limine No. 3 (Doc. 168). Plaintiffs' Response
16 (Doc. 214).**

17 Defendant seeks to exclude evidence, testimony, and argument regarding damage
18 to Plaintiff Gary Cawley's credit score. (Doc. 168 at 2). It argues that there is no causal
19 connection between American Financial's actions and any damage to Plaintiff's credit
20 score, given that American Financial was not the creditor on either of the two medical bills
21 in collection. (*Id.* at 3). Second, it argues that "Plaintiffs have failed to show any damage
22 to Mr. Cawley's credit score outside of Mr. Cawley's normal credit score range." (*Id.*).
23 Finally, it argues that even if his credit score was reduced, his testimony does not establish
24 that he suffered any resulting damage. (*Id.*).

25 Plaintiffs counter that American Financial's first argument is "a red herring"
26 because American Financial itself "delayed and denied payment of medical bills, resulting
27 in those creditors reporting the unpaid debts to agencies." (Doc. 214 at 2). They also argue
28 that there is both evidence that will be presented at trial that Mr. Cawley's credit score was

1 damaged and that he suffered actual harm as a result, such as being unable to secure an
 2 auto loan. (*Id.*).

3 As with the previous two motions, Defendant's arguments are unavailing. Plaintiffs
 4 may present evidence at trial regarding alleged damage to Mr. Cawley's credit score, and
 5 the jury will weigh whether, and to what extent, to attribute any such damage to American
 6 Financial. Accordingly, the motion will be denied.

7 **11. Defendant's Motion in Limine No. 5 (Doc. 170). Plaintiffs' Response
 8 (Doc. 216).**

9 Defendant seeks exclusion of three brochures Plaintiffs seek to admit to show
 10 "specific information regarding the amount of coverage for benefits under American
 11 Financial's 'Traditional' plan as compared to its 'Lite' plan." (Doc. 216 at 1). Plaintiffs
 12 argue that the existence of the "Traditional" as opposed to "Lite" plan is relevant to
 13 Plaintiffs' claims because "Pam Cawley wanted to purchase, and believed she purchased,
 14 something more akin to the 'Traditional' plans in that the 'Traditional' plans had better
 15 coverage." (*Id.* at 1–2). Plaintiffs admit that "she had not seen any of the subject
 16 brochures." (*Id.* at 2).

17 Plaintiffs have failed to establish the relevance of these third-party brochures to the
 18 facts and claims at issue here, which is evident from the fact that Mrs. Cawley herself had
 19 never seen these brochures and simply wanted something "*akin*" to a "Traditional" plan.
 20 Plaintiffs will have ample opportunity to present evidence, testimony, and arguments
 21 regarding the Cawley's expectations of the insurance plan they were purchasing without
 22 resorting to irrelevant and unauthenticated third-party brochures. Accordingly,
 23 Defendant's motion will be granted.

24 **12. Defendant's Motion in Limine No. 6 (Doc. 173). Plaintiffs' Response
 25 (Doc. 217).**

26 Related to the above motion, Defendant more broadly seeks to preclude Plaintiffs
 27 "from introducing at trial any evidence or testimony about the 'Traditional Plan,' because
 28 Plaintiffs have not produced a witness with personal knowledge regarding the plan, nor is

1 there any evidence to suggest that Plaintiffs were ever aware of let alone intended to
 2 purchase a ‘Traditional Plan.’ At best, the only ‘evidence’ of the Traditional Plan are the
 3 Brochures which are themselves inadmissible for the reasons set forth in Motion in Limine
 4 No. 5.” (Doc. 173 at 2). For the same reasons Defendant’s Motion in Limine No. 5 was
 5 granted, this motion will be granted as well. Evidence of the “Traditional Plan” is irrelevant
 6 to the case at hand.

7 **13. Defendant’s Motion in Limine No. 7 (Doc. 174). Plaintiffs’ Response**
 8 **(Doc. 219).**

9 Defendant seeks to preclude Plaintiffs from introducing third-party reviews of IBA
 10 from the Better Business Bureau, arguing that they are irrelevant, inadmissible hearsay,
 11 present a risk of undue prejudice, and are improper “other acts” evidence under Federal
 12 Rule of Evidence 404(b). (Doc. 174 at 2). Plaintiffs argue that the complaints are relevant
 13 because they mirror the Cawleys’ experience with IBA and American Financial. (Doc. 219
 14 at 1). Furthermore, at the FPTC, Plaintiffs argued that the consumer complaints are not
 15 hearsay “because they are offered to impeach IBA and AFSLIC’s claim that they were
 16 delayed in their processing because of COVID.” (Draft Hr’g Tr. 18:4–6).

17 To the extent that Plaintiffs wish to introduce the Better Business Bureau complaints
 18 to show that other customers suffered similar difficulties with American Financial and IBA,
 19 including “that claims were improperly denied or delayed as pre-existing, that providers
 20 and consumers-insureds could never get ahold of anyone at the companies’ customer
 21 service departments to answer questions, calls getting disconnected or hung up on, being
 22 told that claims were never received,” (Doc. 219 at 1), Plaintiffs are seeking for the
 23 complaints to be admitted for the truth of the matter asserted. This constitutes
 24 impermissible hearsay, and the complaints may not be admitted for this purpose. *Cf.*
 25 *United States v. Chavis*, 772 F.2d 100, 104–05 (5th Cir. 1985) (finding that Better Business
 26 Bureau complaints and records were admissible because they were *not* being admitted to
 27 prove the truth of the matter asserted, but rather to show that defendants were notified of
 28 the complaints).

1 As to Plaintiffs' impeachment argument, at the FPTC, they argued that the Better
 2 Business Bureau complaints lack any mention of IBA telling consumers that processing
 3 delays were due to Covid, which they say impeaches IBA and American Financial's claim
 4 that delays in processing the Cawleys' claims were due to Covid. (Draft Hr'g Tr. 17:11–
 5 18:7). This argument is unavailing. It is unclear how the mere fact that these complaints
 6 (which are themselves hearsay) do not contain any mention of Covid constitutes
 7 impeachment evidence that could refute Defendant's position that Covid caused claims-
 8 processing delays.

9 Accordingly, Defendant's Motion will be granted. Plaintiffs may not introduce
 10 third-party reviews of IBA from the Better Business Bureau into evidence at trial.

11 **14. Defendant's Motion in Limine No. 8 (Doc. 175). Plaintiffs' Response
 12 (Doc. 220).**

13 Defendant requests that Plaintiffs be judicially estopped from arguing "that
 14 Plaintiffs did not receive the benefits provided by the written terms of the short term life
 15 insurance policy they purchased." (Doc. 175 at 2). It argues that Plaintiffs have already
 16 conceded that "all benefits under the policy as written were paid out to them," so they
 17 cannot now take an inconsistent position at this stage in the litigation. (*Id.*) Defendant
 18 further argues that because "there is no legal or factual basis for Plaintiffs to argue that they
 19 did not receive the full benefits under the written terms of the STMP policy, any such
 20 testimony, evidence, or argument arguing as such is unduly prejudicial under Rule 403."
 21 (*Id.*).

22 Plaintiffs dispute ever having made such a concession that all benefits under the
 23 policy were paid out to them. They agree that "Gary Cawley's medical bills for cancer were
 24 paid in amounts consistent with the written terms of the Certificate of Insurance ('COI')."
 25 (Doc. 220 at 1). However, they contend that "Plaintiffs do not concede that the benefits
 26 were paid consistently with what should be considered the 'policy' or 'plan' because . . .
 27 the definition of the 'policy' or 'plan' or 'contract' includes the Application, and the
 28 Application is inconsistent with the 'fine print' in the COI." (*Id.*). In other words, the parties

1 dispute the definition of the insurance “policy,” whether it includes both the COI *and*
 2 Plaintiffs’ insurance application, or if it only includes the COI. Additionally, Defendant
 3 argues that the terms of the COI and the Application are not inconsistent. (Draft Hr’g Tr.
 4 21:25–22:1).

5 This Court agrees with Plaintiffs that “[t]he fact that Plaintiffs did not specifically
 6 raise this argument about the Applications becoming part of the Policy in the body of their
 7 Responses to the Motions for Summary Judgment should not preclude them from raising
 8 the argument at trial.” (Doc. 220 at 3). When this Court stated that American Financial paid
 9 “all benefits under the policy as written,” it was based on the fact that the parties did not
 10 (and do not) dispute that benefits were paid out in accordance with the terms of the COI.
 11 (Doc. 160 at 6). However, if Plaintiffs wish to present an argument to the jury that the
 12 policy Application conflicts with the COI, they may do so, just as Defendant may rebut
 13 that argument by presenting evidence to support their contention that the terms of the COI
 14 and the Application are consistent. The Court does not find that Plaintiffs are judicially
 15 estopped from making this argument, nor that presenting such argument would be unduly
 16 prejudicial under Rule 403.

17 Defendant’s Motion will therefore be denied.

18 **15. Defendant’s Motion in Limine No. 9 (Doc. 176). Plaintiffs’ Response
 19 (Doc. 221).**

20 Defendant seeks exclusion of certain financial records of Plaintiffs’ “including but
 21 not limited to bank statements, credit card statements, and other similar financial
 22 documents.” (Doc. 176 at 2). Plaintiffs counter that the evidence, such as bank statements,
 23 “document payments made to various health care providers,” which goes toward the issue
 24 of “the Cawleys having to pay for medical bills they reasonably expected American
 25 Financial to be paying.” (Doc. 221 at 2). Because Plaintiffs are seeking damages based on
 26 medical bills they did not expect to have to pay, evidence of those payments is directly
 27 relevant to Plaintiffs’ ability to fully present their case and allow a jury to determine the
 28 amount, if any, of damages. The Court finds that the probative value of this evidence is not

1 outweighed by a risk of undue prejudice. Accordingly, Defendant's motion will be denied.

2 **16. Defendant's Motion in Limine No. 10 (Doc. 182). Plaintiffs' Response**
 3 **(Doc. 222).**

4 Defendant asks the Court to preclude Plaintiffs "from introducing at trial the
 5 document AFS STM SCRIPT 416 produced by Plaintiffs as CAWLEY000974-980 . . . and
 6 any other evidence, testimony, or argument about the Script, as they "have failed to
 7 authenticate or lay foundation for testimony about the Script, which consists of irrelevant
 8 hearsay that would only serve to confuse and mislead the jury." (Doc. 182 at 2). Plaintiffs
 9 argue that the Script, which was obtained through an online database, (1) shows that
 10 American Financial approved of agents describing its health plans as "paying benefits
 11 similar to that of a major medical insurance plan," similar to how Vaval mischaracterized
 12 Mrs. Cawley's plan when selling it to her over the phone; and (2) it "demonstrates
 13 American Financial's ability to control sales agents, which goes to the issue of the nature
 14 of the relationship between American Financial and sales agent Vaval." (Doc. 222 at 2-3).
 15 They also state that they can call the custodian of records to authenticate the Script at trial
 16 if necessary. (*Id.* at 3).

17 As to Plaintiffs' first argument, which is that the Script shows that American
 18 Financial approved of agents describing its health plans as "paying benefits similar to that
 19 of a major medical insurance plan," Plaintiffs have failed to demonstrate the Script's
 20 relevance for this purpose. Plaintiffs possess, and will likely present, the transcript of the
 21 actual conversation that occurred between Vaval and Mrs. Cawley. It is *this* transcript that
 22 is relevant to Plaintiffs' breach of contract claim, not some other Script that was obtained
 23 online but never actually read to the Cawleys.

24 However, the Court agrees that the Script may be relevant to American Financial's
 25 ability to control sales agents and the nature of its relationship to those sales agents. Before
 26 introducing the Script, Plaintiffs will need to authenticate and lay foundation for the
 27 document. Accordingly, Defendant's Motion will be granted in part and denied in part. If
 28 Plaintiffs properly authenticate and lay foundation for the document, they may introduce

1 AFS STM SCRIPT 416 (CAWLEY000974-980) for the limited purpose of demonstrating
 2 American Financial's ability to control sales agents.

3 **17. Defendant's Motion in Limine No. 11 (Doc. 183). Plaintiffs' Response
 4 (Doc. 223).**

5 In this motion, Defendant seeks to preclude the introduction of certain documents
 6 "produced as CAWLEY002336-2356 (the 'DES Documents')," which include
 7 "correspondence dated January 4 and 5, 2021 related to an application for Nutrition
 8 Assistance, . . . correspondence from DES to the Cawleys dated December 31, 2020 listing
 9 additional information needed in order for DES 'to decide if you can qualify for the
 10 programs you have applied for,' . . . and related notices," as well as pay stub printouts
 11 showing Mrs. Cawley's earnings from Walmart for November and December 2020. (Doc.
 12 183 at 2). The documents do not include any actual application submitted by the Cawleys
 13 to the Arizona Department of Economic Security ("DES") (Doc. 223 at 2).

14 Plaintiffs explain that after selling their business, they were not earning income "and
 15 therefore applied for health insurance with the Arizona Department of Economic Security
 16 (DES), but they were denied. Plaintiffs intend to introduce evidence that they applied to go
 17 on the DES' health care plan, known as AHCCCS, for health insurance in late 2020." (*Id.*
 18 at 1–2). They further state that "[t]he DES documents were documents that Plaintiffs
 19 received after being denied for AHCCCS as the DES then offered them other benefits,
 20 specifically, the Nutrition Program, which Plaintiffs had not sought and did not need." (*Id.*
 21 at 2). While Defendant argues that these documents are irrelevant under Rule 401, Plaintiffs
 22 argue that the documents provide evidence that the Cawleys applied for AHCCCS health
 23 insurance, and that this fact is relevant "because it was a natural consequence of them
 24 having to sell their business which they concluded they needed to do because American
 25 Financial was paying so little of Gary's medical bills, and as a result of that loss of income,
 26 not having funds to purchase a private health care policy." (*Id.*).

27 Plaintiffs' argument here is rather attenuated. Defendant is right that the documents
 28 do not include an application for benefits themselves, but simply correspondence from DES

1 sent to the Cawleys in response to such an application. This decreases the relevance of the
2 documents and increases the likelihood that they could confuse a jury. Additionally, it is
3 unclear if Plaintiffs are attempting to introduce these documents as part of their damages
4 arguments, and if they are, it is unclear how choosing to apply for AHCCCS health
5 insurance constitutes any harm done to Plaintiffs by Defendant. Ultimately, Plaintiffs have
6 not demonstrated the relevance of these documents to the case at hand, and given the risk
7 of confusion of the issues, undue delay, or a waste of time by presenting this evidence to a
8 jury, Defendant's motion will be granted.

9 **18. Defendant's Motion in Limine No. 12 (Doc. 190). Plaintiffs' Response
10 (Doc. 224).**

11 Defendant seeks exclusion of the Arizona Department of Insurance and Financial
12 Institutions Consent Order produced by Plaintiffs as CAWLEY000574-581 (the "DIFI
13 Order") and the Missouri Department of Commerce & Insurance Order and associated
14 Report of Financial Examination of AFSLIC produced by Plaintiffs as CAWLEY000311-
15 332 (the "DCI Order"). (Doc. 190 at 2). The DIFI Order "relates to an investigation
16 conducted by DIFI in response to a consumer complaint" and imposed a penalty for
17 American Financial's "purported delays in responding to DIFI's requests for information
18 needed to complete its investigation." (*Id.*). The DCI Order relates to American Financial's
19 finances and corporate dealings. (*Id.*). Defendant argues that these orders are irrelevant and
20 unduly prejudicial, as "the jury may interpret them as evidence of AFSLIC's culpability—
21 which they are not." (*Id.* at 4).

22 Plaintiffs argue that the DIFI Order "is relevant because it contains evidence
23 consistent with the Better Business Bureau record of consumer complaints that appears in
24 the Cawley's AZDIFI file, i.e., complaints of delay and non-payment by American
25 Financial." (Doc. 224 at 1). Consistent with this Court's granting of Defendant's Motion
26 in Limine No. 7 (Doc. 174) above, which precludes Plaintiffs from introducing third-party
27 reviews of IBA from the Better Business Bureau into evidence at trial, Plaintiffs shall
28 similarly not be allowed to present evidence of the DIFI Order at trial. As Defendant

1 explains, “[t]he DIFI Order does not describe or address the facts of the underlying
 2 consumer complaint but instead focuses on, and imposes a penalty based on, AFSLIC’s
 3 purported delays in responding to DIFI’s requests for information needed to complete its
 4 investigation.” (Doc. 190 at 2). Plaintiffs may not use the DIFI Order as a backdoor to
 5 introduce evidence of a consumer complaint against American Financial; furthermore, this
 6 Court agrees with Defendant that introducing the DIFI Order risks undue prejudice to the
 7 Defendant, as it could lead to an improper inference of wrongdoing, and it also risks
 8 confusion of the issues by the jury. (*See id.* at 3–4). Plaintiffs will not be allowed to present
 9 evidence of the DIFI Order at trial.

10 However, Plaintiffs argue that they should be permitted to introduce the DCI Order
 11 because it provides “information relating to the common ownership between American
 12 Financial and its third party claims administrator International Benefits Administrators,”
 13 which they argue is relevant because “it shows a lack of independence between American
 14 Financial and IBA.” (Doc. 224 at 1–2). They argue that the “close ownership relationship”
 15 between American Financial and IBA “goes directly to American Financials’ [sic] duty of
 16 good faith and fair dealing to Plaintiffs,” as a jury could “infer that IBA would not pay
 17 medical claims, would not respond to insureds’ pleas for help and explanation of coverage,
 18 because such payments would mean, at the end of the day, less profit for the Sonnenbergs,
 19 who owned 94% of American Financial and 100% of IBA.” (*Id.* at 2). They state that they
 20 do not offer the DCI Order as evidence of any sanction, “and such can be redacted or fully
 21 removed.” (*Id.*).

22 Plaintiffs are entitled to present evidence on their bad faith claim for the jury. The
 23 DCI Order may therefore be admitted for the limited purpose of showing common
 24 ownership between American Financial and IBA; however, Plaintiffs are instructed to
 25 present only the portions of the DCI Order that are relevant to this purpose and to redact
 26 all other portions of the Order.

27

28

19. Defendant's Motion in Limine No. 13 (Doc. 191). Plaintiffs' Response (Doc. 225).

3 In this motion, Defendant states that Plaintiffs “have indicated their intent to
4 introduce or attempt to elicit testimony about unspecified Other Proceedings involving
5 AFSLIC or IBA and related allegations, findings, and outcomes.” (Doc. 191 at 2).
6 However, Plaintiffs respond that they “are unclear as to exactly what evidence Defendant
7 means,” and that “Plaintiffs have only listed exhibits from Arizona and Missouri
8 Departments of Insurance which was addressed in Defendant’s Motion in Limine No. 12.”
9 (Doc. 225 at 1). Because this motion appears duplicative of Defendant’s Motion in Limine
10 No. 12, and it is unclear what else Defendant is asking this Court to exclude, the motion
11 will be denied.

20. Defendant's Motion in Limine No. 14 (Doc. 193), No. 15 (Doc. 194), and No. 16 (Doc. 195). Plaintiffs' Response. (Doc. 226).

14 Defendant's last three motions in limine all detail deposition testimony that it seeks
15 to prevent being read into evidence at trial. As discussed during the Final Pretrial
16 Conference, this Court generally waits for the trial to develop before ruling on various
17 requests to exclude portions of depositions, as the evidence that is likely to be introduced
18 at trial may change. Accordingly, these three motions will be denied without prejudice.
19 Defendant may raise particularized objections at trial if and when Plaintiffs attempt to
20 introduce any disputed portions of deposition testimony.

II. *Daubert* Motions

A. Legal Standard

23 Federal Rule of Evidence (“FRE”) 702 permits parties to file motions to exclude to
24 ensure the relevance and reliability of expert testimony. *See Kumho Tire Co. v. Carmichael*,
25 526 U.S. 137, 152–53 (1999). FRE 702 provides that:

26 A witness who is qualified as an expert by knowledge, skill,
27 experience, training, or education may testify in the form of an
opinion or otherwise if the proponent demonstrates to the court
that it is more likely than not that:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Fed. R. Evid. 702. The Rule imposes on the trial courts a gatekeeping obligation to “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993); *see also Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969–70 (9th Cir. 2013) (“Basically, the judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable. The district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to a jury.”). “Whether the expert is appropriately qualified, whether her testimony is relevant, and whether her testimony is reliable are all distinct inquiries under Rule 702.” *Contreras v. Brown*, No. CV-17-08217-PHX-JAT, 2019 WL 2080143, at *1 (D. Ariz. May 10, 2019). The proponent of the expert evidence has the burden of proving the expert’s testimony is admissible under FRE 702 and *Daubert*. *Grant v. Bristol-Myers Squibb*, 97 F. Supp. 2d 986, 989 (D. Ariz. 2000).

B. Motion to Exclude Testimony of Plaintiffs' Expert Witness William Warfel

Defendant proffers four primary arguments for the exclusion of Plaintiffs' insurance expert, Mr. William Warfel: (1) he lacks the requisite knowledge, experience, or expertise in short-term medical policies; (2) his testimony should be excluded to the extent it amounts to conclusions on issues of law; (3) his opinion is unreliable, contradictory, and speculative; and (4) to the extent his reports or testimony are admitted, his opinion on undisclosed topics should be excluded. (Doc. 187 at 10–18). It therefore requests that Mr. Warfel's testimony be excluded in its entirety. (*Id.* at 2).

The Court will not grant Defendant's *Daubert* motion in its entirety, but it will set

1 forth several limiting parameters on Mr. Warfel's proposed testimony.

2 **1. Expertise in Short-Term Medical Policies**

3 Defendant's first argument is that "Mr. Warfel does not have basic knowledge of,
 4 much less experience with or training or education concerning medical insurance policies,
 5 whether comprehensive or short-term, and his generic knowledge and experience with
 6 respect to insurance is not enough to qualify him as an expert in this case." (*Id.* at 10).
 7 Specifically, they note that Mr. Warfel had never seen a short-term medical policy before
 8 this case, could not identify any other carriers of short-term medical insurance, does not
 9 include any discussion of short-term medical policies in the Health Insurance course he
 10 teaches, and has limited to no experience with the handling of claims under medical
 11 insurance plans. (*Id.* at 11–12).

12 Plaintiffs argue that "general experience in an industry can qualify an expert if the
 13 opinions are grounded in relevant knowledge." (Doc. 230 at 4 (citing *United States v.*
 14 *Garcia*, 7 F.3d 885, 889 (9th Cir. 1993))). However, the Court has some reservations about
 15 Plaintiffs' contention that Mr. Warfel's "opinions regarding the standard practices for
 16 disclosure of policy terms, handling of claims, and expectations of insureds draw on this
 17 broader base and are applicable to STM policies and are thus admissible." (Doc. 230 at 4).
 18 It is true that "[a] witness's knowledge of a general professional field may qualify him or
 19 her to testify about a specific practice within that field." *11333 Inc. v. Certain Underwriters*
 20 *at Lloyd's, London*, 261 F. Supp. 3d 1003, 1015 (D. Ariz. 2017). And in his Initial Report,
 21 Mr. Warfel states that he has "taught Health Insurance at Indiana State University since . . .
 22 . 1990, meaning I am very familiar with individual medical expense insurance, short term
 23 transition policies, and policies sold pursuant to the Affordable Care Act." (Doc. 187-1 at
 24 19). The proponent of expert evidence has the burden of proving the expert's testimony is
 25 admissible under FRE 702 and *Daubert*. *Grant v. Bristol-Myers Squibb*, 97 F. Supp. 2d
 26 986, 989 (D. Ariz. 2000). It *may* be true that Mr. Warfel's general insurance knowledge is
 27 also applicable to the short-term medical policy at hand, or that Mr. Warfel has adequate
 28 expertise in this area based on his experience as a professor of Health Insurance—but

1 Plaintiffs have asserted that Mr. Warfel is qualified in this *specific* area without providing
 2 much foundation for that assertion. (See Doc. 187-4 at 15 (Mr. Warfel's admission during
 3 a deposition that this case is "the first, in general, medical expense insurance case that I've
 4 worked on.")).

5 To the extent that Mr. Warfel intends to testify regarding "standard practices for
 6 disclosure of policy terms, handling of claims, and expectations of insureds" *specifically*
 7 with regard to short-term medical policies, counsel may voir dire Mr. Warfel at the time of
 8 trial regarding his knowledge and experience in this area. If proper foundation is laid for
 9 Mr. Warfel's qualifications, his testimony regarding short-term medical policies will be
 10 admitted to the extent that it complies with the rest of this Order and the Federal Rules of
 11 Evidence. *See Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) ("Shaky but admissible
 12 evidence is to be attacked by cross examination, contrary evidence, and attention to the
 13 burden of proof, not exclusion."); *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1231 (9th
 14 Cir. 1998) ("Disputes as to the strength of [an expert's] credentials, faults in his use of [a
 15 particular] methodology, or lack of textual authority for his opinion, go to the weight, not
 16 the admissibility, of his testimony." (internal quotation marks and citation omitted)). If
 17 Defendants raise more particularized objections to any of Mr. Warfel's opinions proffered
 18 at trial, this Court is more than capable of handling such evidentiary issues at that time.

19 **2. "Customary Asterisk" Opinion**

20 While the Court finds that Mr. Warfel is certainly qualified as an insurance expert
 21 *generally*, and it will allow Plaintiffs to elicit further testimony from Mr. Warfel on the
 22 stand regarding his knowledge and expertise on medical insurance policies specifically, it
 23 remains concerned that in certain instances, he fails to explain how his general knowledge,
 24 expertise, and experience is being reliably applied to the specific facts at hand. *See* Fed. R.
 25 Evid. 702(d) (stating that an expert's opinion must reflect "a reliable application of the
 26 principles and methods to the facts of the case"). Mr. Warfel contends that the insurance
 27 policy "custom and practice is to have an asterisk next to the aggregate amount of coverage
 28 . . . alerting the policyholder to the presence of internal policy limits and exclusions"

1 (Doc. 187-4 at 15). He then admits, however, that he has never seen a medical insurance
2 policy with this sort of proviso. (*Id.*). Instead, as examples of the kind of “asterisk” proviso
3 he is speaking of, Mr. Warfel states that, “for example, if an advertisement is run in a
4 newspaper on universal life insurance and it has a big 7.3 percent on the top of the page,
5 there will be an asterisk and, at the bottom of the page, a statement to the effect that interest
6 rates credited on the reserve are based on the current market rate; in other words, alerting
7 the policyholder that the 7.3 percent is not guaranteed.” (*Id.*). The comparison, however, is
8 apples to oranges—Mr. Warfel does not explain how the standards and practices for a life
9 insurance newspaper advertisement are the same as the standards and practices for a
10 medical insurance policy or policy application. (*Id.*). And he does not cite any other
11 examples of “asterisk” provisos in any other insurance policies or policy applications,
12 medical or otherwise, which leaves this Court (and would leave a jury) in the dark about
13 how he has determined that it is a customary practice. *See* Fed. R. Evid. 702, advisory
14 committee’s note to 2000 amendments (“If the witness is relying solely or primarily on
15 experience, then the witness must explain how that experience leads to the conclusion
16 reached, why that experience is a sufficient basis for the opinion, and how that experience
17 is reliably applied to the facts. The trial court’s gatekeeping function requires more than
18 simply ‘taking the expert’s word for it.’” (citation omitted)). None of Mr. Warfel’s expert
19 reports shed light on this issue: Mr. Warfel states that “a simple asterisk adjacent to the
20 \$1,000,000 maximum benefit per coverage period, along with an explanation at the bottom
21 of the Enrollment Application simply stating that the medical expense coverage is subject
22 to the application of numerous internal policy limits . . . , is *required* to alert the applicant
23 that he/she is in fact buying a STM Plan as opposed to a comprehensive, major medical
24 expense insurance plan.” (Doc. 187-3 at 5 (emphasis added)). Mr. Warfel provides no
25 explanation, citation, or basis for his conclusion that such an asterisk and explanation are
26 “required.” *Cf. In re Apollo Grp. Inc. Sec. Litig.*, 527 F. Supp. 2d 957, 964 (D. Ariz. 2007)
27 (noting that an expert not only reviewed documents relevant to the case at hand, but “also
28 cited references in his expert report to support his opinion.”).

1 The Court has a gatekeeping duty under *Daubert* and its progeny to ensure that
 2 expert testimony will assist the trier of fact. *See, e.g., United States v. Gwaltney*, 790 F.2d
 3 1378, 1381 (9th Cir. 1986) (“The general test regarding the admissibility of expert
 4 testimony is whether the jury can receive ‘appreciable help’ from such testimony.” (citation
 5 omitted)). Mr. Warfel has not—despite multiple opportunities—presented any facts, data,
 6 or basis for his “customary asterisk” opinion. At the same time, this Court recognizes that
 7 “[r]eliability of expert opinions about industry standards ‘depends heavily on the
 8 *knowledge and experience* of the expert, rather than the methodology or theory behind it.’”
 9 *Spearman Corp. v. Boeing Co.*, No. C20-13RSM, 2022 U.S. Dist. LEXIS 185703, at *10
 10 (W.D. Wash. Oct. 11, 2022) (quoting *Hangarter v. Provident Life & Accident Ins. Co.*, 373
 11 F.3d 998, 1017 (9th Cir. 2004)). To that end, Plaintiffs’ counsel should voir dire Mr. Warfel
 12 at the time of trial regarding the foundation for his “customary asterisk” opinion to establish
 13 that such opinion is not based “solely on subjective belief.” *Id.* However, once that basic
 14 foundation is laid, this Court believes that the most appropriate avenue for Defendant to
 15 attack Mr. Warfel’s “customary asterisk” opinion is on cross-examination. *See id.* (“[A]ny
 16 disputes as to the lack of [the expert’s] textual authority for his opinions on industry
 17 standards go the weight, not the admissibility, of his testimony. Plaintiff is more than free
 18 to attack [the expert’s] opinion on cross-examination.” (citation omitted)).

19 **3. Bad Faith Opinions**

20 While Mr. Warfel’s proposed testimony related to Plaintiff’s claim for Breach of
 21 Contract of a short-term medical policy is on more tenuous ground, the Court is satisfied
 22 that Mr. Warfel has established his expertise as to bad faith claims in the insurance industry.
 23 (*See generally* Doc. 230-1). As discussed below, Mr. Warfel may not offer any opinions in
 24 the form of improper legal conclusions (e.g., “Defendant acted in bad faith”); however, he
 25 may testify as to the application of insurance industry standards to claims processing. *See*
 26 *Temple v. Hartford Ins. Co. of Midwest*, 40 F. Supp. 3d 1156, 1161 (D. Ariz. 2014) (“Both
 27 Arizona law and Ninth Circuit law recognize that experts in the area of insurance claim
 28 handling are proper, that they may testify regarding the application of industry standards

1 to claim handling, and that they may refer to legal precedent to the extent necessary to
 2 explain the facts of their opinions.”).

3 **4. Legal Conclusions**

4 Defendants also request that Mr. Warfel’s testimony should be excluded “to the
 5 extent it amounts to or includes opinions about issues of law.” (Doc. 187 at 13). While
 6 experts may provide testimony concerning an ultimate issue to be decided by the trier of
 7 fact, Fed. R. Evid. 704(a), an expert cannot give an opinion as to his or her bare legal
 8 conclusions. *See, e.g., United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994) (“When an
 9 expert undertakes to tell the jury what result to reach, this does not *aid* the jury in making
 10 a decision, but rather attempts to substitute the expert’s judgment for the jury’s. When this
 11 occurs, the expert acts outside of his limited role of providing the groundwork in the form
 12 of an opinion to enable the jury to make its own informed determination.”); *Corrales-*
 13 *Gonzalez v. Speed Auto Wholesalers LLC*, No. CV-20-02023-PHX-SPL, 2022 WL
 14 7710514, at *3 (D. Ariz. Aug. 24, 2022) (“[The expert] may not testify as to whether, in
 15 his opinion, Defendants here violated the laws at issue.”).

16 Certain opinions contained within Mr. Warfel’s expert report certainly constitute
 17 inadmissible legal conclusions, such as his assertion that Defendant “clearly breached the
 18 Entire Contract.” (Doc. 187-1 at 12). In many ways, the report toes the line between expert
 19 opinion and impermissible legal advocacy, and this Court would “caution counsel to be
 20 exceedingly careful that [Mr. Warfel’s] testimony does not tread even slightly on this
 21 Court’s exclusive role in determining, and instructing the jury with regard to, the applicable
 22 law.” *Wolfe v. Allstate Prop. & Cas. Ins. Co.*, No. 4:10-CV-800, 2012 WL 12929813, at
 23 *4 (M.D. Pa. July 23, 2012). While Mr. Warfel may testify, for example, that Defendant
 24 has deviated from industry standards, he may not testify as to a legal conclusion that
 25 Defendant acted in bad faith. *See Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d
 26 998, 1016 (9th Cir. 2004) (“While [the expert witness]’s testimony that Defendants
 27 deviated from industry standards supported a finding that they acted in bad faith, [the
 28 witness] never testified that he had reached a legal conclusion that Defendants actually

1 acted in bad faith (i.e., an ultimate issue of law.”). Should Plaintiffs run afoul of this edict,
 2 the Court is certain that Defendant will be more than eager to raise appropriate objections
 3 at trial.

4 In conclusion, this *Daubert* motion will be granted in part and denied in part as
 5 outlined above. Defendant may certainly raise more particularized objections to any
 6 improper testimony that arises during the course of trial—for example, should Mr. Warfel
 7 attempt to improperly speculate as to “Mrs. Cawley’s impressions or beliefs,” (Doc. 187 at
 8 17), Defendant may raise an objection if such an issue arises. *See Sw. Fair Hous. Council*
 9 *v. WG Chandler Villas SH LLC*, 562 F. Supp. 3d 18, 23 (D. Ariz. 2021) (“An expert’s
 10 opinions may not be premised on ‘subjective belief or unsupported speculation.’” (quoting
 11 *Daubert*, 509 U.S. at 590)). However, assuming Plaintiffs’ counsel lays proper foundation
 12 for Mr. Warfel’s medical insurance expertise, his opinions are best challenged via cross-
 13 examination, not exclusion.

14 **C. Motion to Exclude Testimony of Plaintiffs’ Expert Witness Mark
 15 McKinnon**

16 Defendant also moves for the exclusion of Plaintiffs’ damages expert, Mark
 17 McKinnon,² on the basis that (1) his methodology for calculating damages is unreliable
 18 and speculative, (2) he is not qualified to offer business valuation opinions, and (3) his
 19 opinions are unduly prejudicial under Rule 403. (Doc. 188 at 7–14). Mark McKinnon is
 20 proffered by Plaintiffs to testify regarding the “present day value of economic damages”
 21 based on Plaintiffs’ alleged loss of a franchised B+B Store they owned a 40% interest in.
 22 (Doc. 231 at 1–2). His report contends that “the B+B Store would have a present value
 23 revenue stream of \$1,222,750 through 2028 if the Plaintiffs would have retained the store
 24 for 10 years,” and that if Plaintiffs had followed through on purchasing a second store,
 25 “that second franchise would have had a revenue stream of \$1,209,899.” (Doc. 188 at 4).

26 Defendant argues that Mr. McKinnon’s methodology is flawed because (1) it relies

28 ² Plaintiffs note that Defendant incorrectly named Mr. McKinnon as Thomas, rather
 than Mark, McKinnon. (Doc. 231 at 1 n.1).

1 on data from stores in operation for at least seven years, where Plaintiffs' store was in
 2 operation for only 18 months, (2) it relies on data from top-performing stores, and (3) it
 3 ignores the facts that Plaintiffs owned only 40% of the store. (*Id.* at 7–8). Defendant then
 4 argues more broadly that Mr. McKinnon's opinions should be excluded because he "does
 5 not have any business valuation expertise," "doesn't hold any certifications related to
 6 business valuations," and "doesn't have any specialized training or knowledge in business
 7 valuations." (*Id.* at 10).

8 However, Plaintiffs contend that "Mr. McKinnon was not asked to perform, and did
 9 not perform, a business valuation. Instead, Mr. McKinnon did what economic damage
 10 experts regularly do—calculate present day value of economic damages based upon
 11 information provided to them about the scope of the loss." (Doc. 231 at 1). As Plaintiffs
 12 explain, rather than doing a business valuation, "Mr. McKinnon used a net profit figure
 13 known as 'EBIDTA' (Earnings Before Interest, Taxes, Depreciation, and Amortization)
 14 already calculated by the Business Plus Bulbs ('B+B') parent company in a B+B Franchise
 15 Disclosure Document ('B+B Franchise Disclosure Document')," then "used this existing
 16 EBIDTA figure to do his own calculations to determine the present day value of what the
 17 store would have earned over ten years—in other words, its lost profit over a period of 10
 18 years." (*Id.* at 2–3).

19 The Court finds that Mr. McKinnon is certainly adequately qualified as an
 20 economist: he has a Bachelor of Science in Mathematics, a Master of Business
 21 Administration, and a Master of Science in Mathematics. (Doc. 188-1 at 8). He has been
 22 employed as an economics consultant since 2008, is a member of both the National
 23 Association of Forensic Economics and the American Academy of Economic and Financial
 24 Experts, and has testified in over 70 cases. (*Id.* at 8–9, 13–14); *see, e.g., Dubey v.*
25 Concentric Healthcare Sols. LLC, No. CV-22-02044-PHX-DJH, 2025 WL 1663836, at *5
 26 (D. Ariz. June 12, 2025) ("The Court finds that [the expert witness] is qualified to testify
 27 as an economics expert through his experience and through his education."). Likewise, the
 28 Court finds that his methodologies are reliable and relevant to this case. *Cf. In re Apollo,*

1 527 F. Supp. 2d at 963. Mr. McKinnon thoroughly explains the calculations he did to form
2 the basis of his opinions. (*See* Doc. 188-1 at 2–4). To the extent that Defendant contests
3 the strength of the underlying data Mr. McKinnon chose when making those calculations,
4 Defendant is certainly entitled to question Mr. McKinnon on the stand regarding why he
5 may have chosen to use certain data over other potentially available data, but Defendant’s
6 objections do not warrant wholesale exclusion of Mr. McKinnon’s testimony. *See, e.g., In*
7 *re Apollo*, 527 F. Supp. 2d at 963 (“Defendants’ specific objections concern matters that
8 go to the weight of the evidence and are appropriately addressed on cross-examination.”).

9 Accordingly, Defendant’s *Daubert* motion to exclude the opinions and testimony of
10 Mark McKinnon will be denied.

11 **III. CONCLUSION**

12 In sum, having carefully considered the parties’ briefing and oral arguments at the
13 Final Pretrial Conference,

14 **IT IS ORDERED** as follows:

- 15 1. Plaintiffs’ Motion in Limine No. 1 (Doc. 171) is **granted**. Defendant is
16 precluded from introducing evidence, testimony, or inquiries regarding the
17 portion of Armpriester’s October 5, 2021, letter referring to Covid (at
18 AZDOI_000029-31) and AZDIFI’s response (at CAWLEY000582-586 and
19 AZDOI_000073-74) at trial.
- 20 2. Plaintiffs’ Motion in Limine No. 2 (Doc. 172) is **denied**.
- 21 3. Plaintiffs’ Motion in Limine No. 4 (Doc. 178) is **granted in part and denied**
22 **in part**. Plaintiffs’ motion is denied to the extent it seeks to exclude *any*
23 evidence or testimony about the alleged approval of the subject health
24 insurance forms. However, because Mr. Armpriester lacks personal
25 knowledge regarding those approvals, he is precluded from testifying as to
26 what he knows based only on what the company’s regulatory attorney told
27 him. He may still testify more generally on his knowledge of the general
28 approval process based on his personal knowledge and experience in the

1 industry.

2 4. Plaintiffs' Motion in Limine No. 5 (Doc. 202) is **denied**.

3 5. Plaintiffs' Motion in Limine No. 6 (Doc. 180) is **granted**. Neither party's

4 expert witnesses may opine on issues of law, including whether Ms. Vaval

5 and/or Mr. Bowen were agents of American Financial.

6 6. Plaintiffs' Motion in Limine No. 7 (Doc. 181) is **granted**. Neither party's

7 expert witnesses may offer improper opinions about the reasonableness of

8 Plaintiffs' expectations regarding insurance coverage.

9 7. Plaintiffs' Motion in Limine No. 8 (Doc. 184) is **granted**. Neither party's

10 expert witnesses may opine on the reasonableness of the Cawleys' actions

11 when reading/reviewing the STMP.

12 8. Defendant's Motion in Limine No. 1 (Doc. 166) is **denied**.

13 9. Defendant's Motion in Limine No. 2 (Doc. 167) is **denied**.

14 10. Defendant's Motion in Limine No. 3 (Doc. 168) is **denied**.

15 11. Defendant's Motion in Limine No. 5 (Doc. 170) is **granted**. Plaintiffs are

16 precluded from offering at trial the AdvantHealth STM brochure (Joint

17 Pretrial Statement, Proposed Exhibit 127), the Thrive Health STM brochure

18 (Joint Pretrial Statement, Proposed Exhibit 128), and the document referred

19 to as "AFS STM Brochure – 0822 – Red" and produced as

20 CAWLEY000666-674 (Joint Pretrial Statement, Proposed Exhibit 12).

21 12. Defendant's Motion in Limine No. 6 (Doc. 173) is **granted**. Plaintiffs may

22 not introduce at trial any evidence or testimony about the "Traditional Plan."

23 13. Defendant's Motion in Limine No. 7 (Doc. 174) is **granted**. Plaintiffs may

24 not introduce third-party reviews of IBA from the Better Business Bureau

25 into evidence at trial.

26 14. Defendant's Motion in Limine No. 8 (Doc. 175) is **denied**.

27 15. Defendant's Motion in Limine No. 9 (Doc. 176) is **denied**.

28 16. Defendant's Motion in Limine No. 10 (Doc. 182) is **granted in part and**

denied in part. If Plaintiffs properly authenticate and lay foundation for the document, they may introduce AFS STM SCRIPT 416 (CAWLEY000974-980) only for the limited purpose of demonstrating American Financial's ability to control sales agents.

5 17. Defendant's Motion in Limine No. 11 (Doc. 183) is **granted**. Plaintiffs may
6 not introduce certain documents produced as CAWLEY002336-2356 (the
7 "DES Documents"), which includes correspondence dated January 4 and 5,
8 2021 related to an application for Nutrition Assistance; correspondence from
9 DES to the Cawleys dated December 31, 2020 listing additional information
10 needed in order for DES to decide if they were qualified; and pay stub
11 printouts showing Mrs. Cawley's earnings from Walmart for November and
12 December 2020.

13 18. Defendant's Motion in Limine No. 12 (Doc. 190) is **granted in part and**
14 **denied in part**. Plaintiffs will not be allowed to present evidence of the DIFI
15 Order at trial. However, Plaintiffs may introduce portions of the DCI Order
16 for the limited purpose of showing common ownership between IBA and
17 American Financial.

18 19. Defendant's Motion in Limine No. 13 (Doc. 191) is **denied**.

19 20. Defendant's Motion in Limine No. 14 (Doc. 193) is **denied without**
20 **prejudice** to particularized objections to specific testimony being raised at
21 trial.

22 21. Defendant's Motion in Limine No. 15 (Doc. 194) is **denied without**
23 **prejudice** to particularized objections to specific testimony being raised at
24 trial.

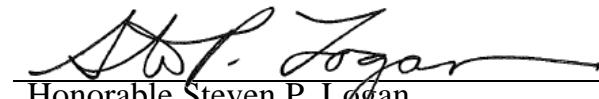
25 22. Defendant's Motion in Limine No. 16 (Doc. 195) is **denied without**
26 **prejudice** to particularized objections to specific testimony being raised at
27 trial.

28 23. Defendant's Motion to Exclude Testimony of Plaintiffs' Expert Witness

1 William Warfel (Doc. 187) is **granted in part and denied in part**. Mr.
2 Warfel will not be permitted to offer any opinions in the form of legal
3 conclusions. Furthermore, Plaintiffs' counsel should lay the proper
4 foundation for Mr. Warfel's opinions regarding industry standards and
5 customs with respect to medical insurance policies and short-term medical
6 policies, specifically. However, to the extent Defendant seeks wholesale
7 exclusion of Mr. Warfel's testimony, the Motion is denied. Defendant may
8 raise particularized objections to any improper testimony at trial, and it may
9 appropriately attack Mr. Warfel's proffered opinions on cross-examination.

10 24. Defendant's Motion to Exclude Testimony of Plaintiffs' Expert Mark
11 McKinnon (Doc. 188) is **denied**.

12 Dated this 2nd day of July, 2025.

13 
14 Honorable Steven P. Logan
15 United States District Judge